FAIZAL OSMAN A

v.

NEELAKANDAN MANARSAMY

HIGH COURT MALAYA, PULAU PINANG B
BALIA YUSOF WAHI J
[CIVIL APPEAL NO: 12-12-2005]
4 SEPTEMBER 2008

DAMAGES: *Action for - Personal injuries - Motor vehicle accident - Claim for damages suffered - Evaluation of evidence - Failure to make a conclusion by sessions court judge - Non-consideration of relevant evidence - Whether constituted 'insufficient judicial appreciation of relevant evidence' - Whether sessions judge's consideration of evidence lopsided and merited criticism - Whether court in its appellate jurisdiction should intervene* C D

EVIDENCE: *Appeal - Interfering with finding of fact - Evaluation of evidence - Failure to make a conclusion by sessions court judge - Non-consideration of relevant evidence - Whether constituted 'insufficient judicial appreciation of relevant evidence' - Whether sessions judge's consideration of evidence lopsided and merited criticism - Whether court in its appellate jurisdiction should intervene* E

The appellant brought an action against the respondent in the sessions court for damages suffered arising from a motor vehicle accident. His claim was dismissed by the learned sessions judge F with costs and hence this appeal. Briefly, the facts were that on 23 April 2000, the appellant was riding his motorcycle from Jalan Kelawei towards Tanjung Tokong. At the same time, he realized a Proton Wira somewhat golden in colour being driven alongside on his left going in the same direction as him. Suddenly, the said car G made a U turn in front of him and resulted in him knocking into the right rear door of the said car. The appellant fell with his motorcycle on top of him. According to him, the road was dark and without lights but he could see the car's number plate being PCT 5033. The car after making the U turn, stopped at a nearby H restaurant and about three to four people came to his aid. The driver of the said car, described to be an Indian man aged between 40 to 50 years old, came to see the appellant and offered him RM50 for medical expenses. The appellant suffered a fracture on his backbone described as 'compression fracture L1' with no I neurological deficit. About three weeks later, on 12 May 2000, the appellant lodged a police report about the accident. In

response, the respondent admitted that he was the registered owner of the Proton Wira No: PCT 5033, golden brown in colour. On the date and time of the accident, he stated that the car was parked at his house and he kept the key. According to the defendant, it was impossible for others to drive the car that night. The defendant submitted that he had only realized that this car was involved in an accident when he failed to renew the road tax and the car was blacklisted by the Jabatan Pengangkutan Jalan. The issue that arose was whether this was one of those cases where this court in its appellate jurisdiction should interfere.

Held (allowing the appeal):

(1) The sessions court judge had failed to make any conclusion as to the evaluation of the evidence by the witnesses. She merely expressed her doubt as to both the evidence of the plaintiff (appellant) as well as that of the defendant (respondent) and came to the conclusion that because the court was still left in a doubt as to whether the defendant's car was really involved in the accident, the plaintiff's claim therefore ought to be dismissed. The learned sessions court judge had clearly set too high a standard on the part of the appellant to prove his case. She had also failed to take into consideration the other circumstances of the case in coming to the conclusion whether or not the respondent's car was involved in the accident. Besides the registration number of the car, the make of the car, its colour and the nationality of the driver of the car at the time of the accident were totally disregarded and had not been taken into consideration. There were too many coincidences here that this court in its appellate jurisdiction could not ignore. Judicial evaluation of the whole evidence of the case was obviously absent. Non consideration of relevant evidence constituted 'insufficient judicial appreciation of relevant evidence.' (para 4)

(2) The inherent probability or improbability of a fact in issue must be the prime consideration. The improbability of the respondent's evidence and likewise his demeanour had not been fully evaluated and appreciated by the learned trial judge. In the respondent's police report, he had stated that he was informed by his daughter that he was involved in an accident with the vehicle No PCX 6015, the appellant's motorcycle. In the statutory declaration made by the respondent which was produced as the defendant's evidence, he indicated that he

only knew about the accident upon his failure to renew the road tax and after a visit to the Jabatan Pengangkutan. Clearly there was a contradiction between his statutory declaration and his police report. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. (para 6)

(3) The learned sessions judge had failed to make a finding on the two sets of evidence which were both equally 'meragukan' to her. There was no rejection and/or acceptance of the evidence and the reason for such rejection or acceptance. This ran foul of the requirement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. Although in her judgment she made an observation about the defendant's evidence as 'bukannya satu perkara yang 'improbable' langsung, this was insufficient as nothing was said of the appellant's evidence. Her consideration of the evidence if any was lopsided and merited criticism. (para 9)

(4) The instant appeal was one of such cases where this court was at liberty to intervene and form its own view on the whole of the evidence available. (para 13)

Case(s) referred to:

Armagas Ltd v. Mundogas SA; The Ocean Frost' [1985] 1 Llyod's Rep 1 ***(refd)***
Chow Kok Beng v. Choo Kok Hoe & Ors [1998] 2 MLJ 29 ***(refd)***
Gotham Construction Co v. Amulya Krishna [1968] AIR Calcutta 91 ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Mst Chameli Debi v. Purusattam Singh [1974] AIR Calcutta 316 ***(refd)***
Ratna Ammal v. Tan Chow Soo [1966] 1 LNS 153 ***(refd)***
State of Rajasthan v. Hanuman AIR [2001] SC ***(refd)***
Tek Chand v. Dide Ram AIR [2001] SC 905 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 ***(refd)***
Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors [1940] 1 LNS 119 ***(refd)***
Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC ***(refd)***

For the appellant - Brijnandan Singh; M/s Brijnandan Singh Bhar & Co
For the respondent - Sunita Kaur; M/s Ajmer, Sandhu & Ong

Reported by Suhainah Wahiduddin

A

JUDGMENT

Balia Yusof Wahi J:

[1] The appellant in the present case brought an action against the respondent in the George Town Sessions Court for damages suffered arising from a motor vehicle accident on 23 April 2000. His claim was dismissed by the learned Session Judge with costs and hence this appeal.

B

Background Facts

C

[2] At about 11.25pm on 23 April 2000 the appellant was riding his motorcycle from Jalan Kelawei towards Tanjung Tokong. At the same time he realized a Proton Wira some what golden in color being driven alongside on his left going in the same direction as him. Suddenly, the said car made a U-turn in front of him and resulting in him knocking into the right rear door of the said car. The appellant fell with his motorcycle on top of him. According to him the road was dark and without lights but he could see the car's number plate being PCT 5033. The car after making the U-turn, stopped at a nearby restaurant and about 3 to 4 people came to his aid. The driver of the said car, described to be an Indian man aged between 40-50 came to see the appellant and offered him RM50 for medical expenses. The appellant suffered a fracture on his backbone described as "compression fracture L1" with no neurological deficit. About three weeks later, on 12 May 2000 the appellant lodged a police report about the accident.

D

E

F

[3] In response, the respondent admitted that he is the registered owner of the Proton Wira No: PCT 5033, golden brown in colour. On the date and time of the accident, he stated that the car was parked at his house and he kept the key. He was fast asleep at that time. The car key is kept together with a bunch of other keys kept in a drawer which was locked and the key to that drawer is kept in the pocket of his pyjama. According to the defendant it was impossible for others to drive the car that night. He only realized that this car was involved in an accident when he failed to renew the road tax and the car was being blacklisted by the Jabatan Pengangkutan Jalan.

G

H

I

The Appeal

[4] At the conclusion of the appeal, I find that this is one of those cases where this court in its appellate jurisdiction should interfere. Having perused the learned Sessions Court Judge's grounds of judgment, it is glaring that she has failed to make any conclusion as to the evaluation of the evidence by the witnesses. From her grounds, she merely expresses her doubt as to both the evidence of the plaintiff (appellant) as well as that of the defendant (respondent) and came to the conclusion that because the court was still left in a doubt as to whether the defendant's car was really involved in the accident, the plaintiff's claim therefore ought to be dismissed. The learned Sessions Judge clearly sets too high a standard on the part of the appellant to prove his case. She simply refused to believe that appellant was able to see the registration number of the car that he knocked into. She has also failed to take into consideration the other circumstances of the case in coming to the conclusion whether or not the respondent's car was involved in the accident. Besides the registration number of the car, the make of the car, its colour and the nationality of the driver of the car at the time of the accident were totally disregarded and has not been taken into consideration. There are too many coincidences here that this court in its appellate jurisdiction can not ignore, which the learned trial judge has ignored and not taken into consideration. These are relevant evidence and ought to be considered by the learned Sessions Judge. There is nothing sinister about the appellant being able to see and remember the registration number of the car which the learned Sessions Judge found so difficult to accept. Judicial evaluation of the whole evidence in the case was obviously absent. Non consideration of relevant evidence constitutes "insufficient judicial appreciation of relevant evidence" which phrase was lucidly explained by the Court of Appeal in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19. In my view, this failure to consider the other circumstances which constitute relevant evidence is a serious flaw in the Session Court Judge's decision and merits appellate interference. In *Mst Chameli Debi v. Purusattam Singh* [1974] AIR Calcutta 316, Sinha J stated as follows:

> It is well established that failure to consider important evidence or important surrounding circumstances would constitute an error of law and it would be open to this court in that situation to interfere in second appeal.

Failure to consider material and relevant evidence does make an error of law (*Gotham Construction Co v. Amulya Krishna* [1968] AIR Calcutta 91).

[5] There are ample authorities both local and foreign which may be cited giving the appellate court powers to interfere with the decisions of trial judges in instances where the decision has been arrived at without any or insufficient judicial evaluation and appreciation of the evidence adduced. One such authority is the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor (supra)*. At pp. 33 & 37 of the said report, His Lordship Gopal Sri Ram JCA stated as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.
>
> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.
>
> In our considered judgment, the authorities discussed thus far, apart from explaining what judicial appreciation of evidence involve, illustrate a principle central to appellate interference. The principle is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal. There are several authorities that establish the principle.

(See also: *Lim Tai Ming & Sons Credit Sdn Bhd v. Lim Tuck Thien* [2001] 1 CLJ 316; *Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung and Another Appeal* [1997] 3 CLJ 189; *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; *Putra v. Sivagnanam & Anor* [1958] 1 LNS 53; *Benmax v. Austin Motor Co Ltd* [1955] AC 370; *Sheo Swarup & Others v. The King Emperor* 51 TLR 10 (c).

[6] While admitting that she entertains doubt as to the truth of the respondent's defence especially with regard to the safe keeping of the key and to the fact about the respondent's daughter hearing rumours about the involvement of the respondent's car in the accident, she concluded that the evidence is not totally improbable. Here I pause to state that the inherent probability or improbability of a fact in issue must be the prime consideration. The improbability of the respondent's evidence and likewise his demeanour has not been fully evaluated and appreciated by the learned trial judge. We have a case of a defendant who does not even remember whether he was involved in any accident but categorically denies knocking into a motorcyclist which occurred four years before his testimony was given in court. The fact that the learned Sessions Judge believe one witness and not the other does not preclude a closer scrutiny of the evidence by this court. The learned Sessions Judge has clearly failed to evaluate the respondent's evidence regarding the discrepancy in his evidence relating to how he came to know about the accident as stated in his police report and the version he gave while giving evidence. It is glaring from her judgment that she has failed to fully appreciate that piece of evidence in coming to her conclusion. In his police report which was made about two years after the incident, the respondent stated that he was informed by his daughter that he was involved in an accident with the vehicle No: PCX 6015, the appellant's motorcycle. While in evidence, he stated that he only became aware of the accident upon his failure to renew the road tax and after going to the Jabatan Pengangkutan Jalanraya. In the Rekod Rayuan Tambahan, a statutory declaration made by the respondent on 28 April 2003 which was produced as the defendant's evidence, indicates that he only knew about the accident upon his failure to renew the road tax and after a visit to the Jabatan Pengangkutan Jalan. Clearly there is a contradiction between his statutory declaration and his police report. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. The learned Sessions Judge has failed to do so. (*Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS

119). In estimating what weight is to be attached to this piece of evidence, the learned Sessions Judge must have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the respondent's evidence and in particular to the question whether or not he had any motive to conceal or misrepresent the facts. This is what was stated by the court in *Ratna Ammal v. Tan Chow Soo* [1966] 1 LNS 153 in referring to motive as an element which ought to be considered in the appreciation of oral evidence. She has also failed to critically test the evidence of the parties against the totality of their evidence and has not properly analyzed the entirety of the evidence which was given before her. (See *Chow Kok Beng v. Choo Kok Hoe & Ors* [1998] 2 MLJ 29 at p 168-169).

[7] Perusing the judgment of the learned Sessions Judge, I am in full agreement with the appellant's counsel submission that the learned Sessions Judge has failed to make a positive finding which of the evidence, either of the appellant or that of the respondent was accepted. She expresses doubt not only on the appellant's evidence but also that of the respondent's. For the appellant's evidence she said:

> Mahkamah masih meragu-ragu adakah plaintif benar-benar boleh nampak nombor kereta ini? Jikapun plaintiff nampak nombor ini dengan sepintas lalu dalam keadaan cemas demikian, di mana plaintiff terjatuh ditindih oleh motosikal dan di dalam kesakitan tulang belakang, adakah beliau pasti nombor kereta yang dinyatakan dalam laporan polis ini betul?

[8] For the respondent's evidence, this is what the learned Sessions Judge found:

> Mahkamah ini sebenarnya juga meragui kebenaran keterangan pembelaan, iaitu fakta defendan menyimpan kunci kereta dalam almari, dan kunci almari pula di simpan dalam poket defendan semasa tidur, serta juga fakta bahawa anak perempuan defendan dengar dari orang luar tentang penglibatan kereta defendan dalam kemalangan ini.

And she concludes thus:

> Pada fikiran Mahkamah apa yang lebih penting adalah beban pembuktian tetap terletak pada pihak plaintif. Mahkamah berpendapat, atas imbangan keberangkalian, Mahkamah kurang pasti adakah kereta defendan benar-benar terlibat dalam kemalangan ini. Dengan demikian, Mahkamah terpaksa menolak tuntutan plaintif dengan kos.

[9] Clearly, the learned Sessions Judge has failed to make a finding on the two sets of evidence which are both equally "meragukan" to her. There is no rejection and/or acceptance of the evidence and the reason for such rejection or acceptance. This runs foul of the requirement that 'a judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him'. Although in her judgment she made an observation about the defendant's evidence as "bukannya satu perkara yang "improbable" langsung", this to my mind is insufficient as nothing was said of the appellant's evidence. Her consideration, of the evidence, if any, is lopsided and merits criticism. As opined by Shivaraj Patel J of the Indian Supreme Court in *Tek Chand v. Dide Ram* AIR [2001] SC 905 at p. 916:

> No doubt, an appeal court will be slow in disturbing a finding of fact recorded by the trial court based on proper appreciation of evidence but it is also the duty of the appellate court to disturb it if the burden of proof is not discharged by cogent, positive and acceptable evidence in the light of law laid down by this court. **More so when there is non-consideration of material evidence and appreciation of evidence is not objective and one sided.** (emphasis added).

[10] In *State of Rajasthan v. Hanuman* AIR [2001] SC, at p. 284, the Supreme Court of India, through the judgment of Mohapatra J held:

> An appellate court should assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the trial court is not vitiated on account of any erroneous approach or illegality and it is not palpably erroneous. The *sustainability of the judgment depends on the soundness of the reasons given in support of the findings and the conclusion.* (emphasis added).

[11] The learned Sessions Judge has definitely not taken advantage of having heard and seen the witnesses herself. As observed by Edgar Joseph Jr SCJ in *Yusoff b Kassim v. Public Procecutor* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376:

> In all the circumstances, having regard to the fact that the trial judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences from, the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he had not taken proper advantage of his having seen and heard the

witnesses (per Lord Thankerton in *Watt or Thomas v. Thomas* [1947] 1 All ER 582) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence.

[12] And again, Gopal Sri Ram JCA in the *Lee Ing Chin* case *(supra)* referred to a passage said by Robert Goff CJ in *Armagas Ltd v. Mundogas SA; The Ocean Frost'* [1985] 1 Llyod's Rep 1 reiterating thus:

> Furthermore it is implicit in the statement of Lord Mac Millan in *Powell v. Streatham Manor Nursing Home* [1934] AC 243 at page 256 that the probabilities and possibilities of the case may impel an appellate court to depart from the opinion of the trial judge formed upon his assessment of witnesses whom he has seen and heard in the witness box.

[13] In my view, the instant appeal is one of such cases where this court is at liberty to intervene and form its own view on the whole of the evidence available.

[14] Mc Elwaine CJ in the case of *Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors* [1940] 1 LNS 119 expressed thus:

> An appellate court should be very loath to differ on a finding of fact by a court which has seen and heard witnesses, but if the learned Judge can be shown to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason or to have drawn an inference from evidence, which are equally capable of supporting a different inference it may be the duty of an appellate court to interfere.

[15] For those foregoing reasons, the appeal is hereby allowed, with costs to be taxed here and below and the deposit be refunded. Since the appellant is not appealing against the quantum as decided by the learned Sessions Judge, that order is hereby affirmed.